

DECISION AND ORDER

IN THE MATTER OF THE HUMAN RIGHTS CODE, S.O. 1981, c.53

AND IN THE MATTER OF a complaint by Brett Chamberlin alleging discrimination in employment on the basis of handicap by 599273 Ontario Limited carrying on business as Stirling Honda and Allan Pearson

BEFORE: Ian C. Springate, Board of Inquiry

Appearances: Mr. Brett Chamberlin,
on his own behalf

Mr. Mark Frawley, Ms Joanne Rosen
Mr. Anthony Griffin and Ms Deirdre Rice,
for the Ontario Human Rights Commission

Mr. Clyde Halford,
for 599273 Ontario Limited Carrying on
Business as Stirling Honda and
Mr. Allan Pearson

Hearings: October 4, 1988; January 16, 17, 18, 19
and February 10, 1989

DECISION

The name of one of the respondents appearing in the complaint giving rise to these proceedings is amended to read: "599273 Ontario Limited carrying on business as Stirling Honda."

The complainant, Mr. Brett Chamberlin, and the Ontario Human Rights Commission ("the Commission") contend that Mr Chamberlin's right to equal treatment with respect to employment without discrimination was infringed because of a handicap contrary to the provisions of the Human Rights Code. The Commission submits that the handicap was a mental disorder, namely "adjustment disorder with depressed mood." The respondents dispute that Mr. Chamberlin had a handicap as that term is used in the Code. They contend that he had instead certain personality problems which interfered with his ability to do his job. In the alternative, the respondents contend that they were not aware that Mr. Chamberlin had a handicap and accordingly they could not have discriminated against him on this basis. The respondents further contend that they took reasonable steps to accommodate any handicap.

Prior to the events giving rise to these proceedings, Mr. Chamberlin had worked in various sales positions. In 1984 he obtained employment with a Ford dealership in Hamilton, initially as a car salesman and later as its fleet and lease manager. He

left this position on or about February 18, 1985 to assume the position of business manager with another Hamilton automobile dealership, namely 599273 Ontario Limited carrying on business as Stirling Honda ("Stirling Honda"). Mr. Chamberlin testified that he applied for the business manager position because he felt the experience would increase his value to an automobile dealership.

The title "business manager" is one commonly used by automobile dealerships to describe the type of position held by Mr. Chamberlin. The title is, however, very misleading. Mr. Chamberlin did not oversee the business affairs of Stirling Honda or take responsibility for managing any of its staff. He was, in reality, a salesperson responsible for selling a variety of services, sometimes referred to as after market products, to customers who had already agreed to purchase an automobile. Among the services sold by Mr. Chamberlin were financing contracts, extended warranties, and automobile protection packages, most notably rustproofing. After an automobile salesperson had sold a car to a customer, he would introduce the customer to Mr. Chamberlin as the dealership's business manager who would finalize the details of the sale. It was felt that this approach, rather than introducing Mr. Chamberlin as another salesman, would result in the customer being more relaxed and hence more likely to purchase the services Mr. Chamberlin was offering for sale.

When Mr. Chamberlin commenced working at Stirling Honda he was going through a difficult period in his life. He and his wife of some six years had separated two months previously. In May of 1985 Mr. Chamberlin's wife sought, and obtained, a court order directing that he pay support payments considerably greater than he had been voluntarily paying to her. His wife had also indicated to Mr. Chamberlin that if he failed to meet certain conditions she had set, she would try to prevent him from seeing their infant daughter. To make matters worse, Mr. Chamberlin began to have disagreements with the lawyer he had retained to assist him with his matrimonial problems.

As business manager Mr. Chamberlin received a commission equal to 25 percent of the net revenue received by the dealership from the services he sold. Although the automobile salesmen worked in shifts, Mr. Chamberlin was the only one at the dealership in his position. This resulted in him working long hours, generally 8:45 a.m. to 9:30 p.m. Monday to Thursday and 8:45 a.m. to 6:00 p.m. Friday and Saturday. As noted below, the long hours led Mr. Chamberlin to complain to his doctor about being overworked.

When testifying in these proceedings Mr. J. Lecluse, the President of Stirling Honda, indicated that management had consistently been disappointed with the level of sales achieved by

Mr. Chamberlin. I do not accept this evidence. Although Mr. Chamberlin's sales levels were below those achieved by business managers in certain other dealerships owned by Mr. Lecluse, two important factors contributed to this situation. Firstly, the position of business manager was a relatively new one at Stirling Honda. Until the creation of the position five or six months prior to Mr. Chamberlin's arrival, automobile salesmen had sold the services now being sold by Mr. Chamberlin. A number of salesmen were resentful of the change since it resulted in a loss of commissions, and accordingly they did not co-operate fully with Mr. Chamberlin. There was also Mr. Chamberlin's own inexperience in the position. When these considerations are taken into account, Mr. Chamberlin's initial sales performance was reasonably good. Further, the evidence taken as a whole indicates that at the time management, including Mr. Lecluse, was reasonably satisfied with Mr. Chamberlin's initial performance. The evidence also establishes, however, that management anticipated that Mr. Chamberlin's sales levels would continue to improve.

During May of 1985, Mr. Chamberlin's third complete month of employment at Stirling Honda, his overall sales levels not only failed to improve but dropped significantly. In April Mr. Chamberlin sold financing arrangements with respect to some 26 percent of all vehicles delivered within the month to a customer. In May this figure dropped to about 10 percent. Mr. Chamberlin

acknowledged that the sale of finance contracts was the most important of the services he sold in terms of potential income to the dealership. Mr. Chamberlin sold an extended warranty with respect to 37 percent of all vehicles delivered to customers in April. In May this figure was down to 19 percent. The sales of rustproofing for new cars did, however, improve, going from 48 to 62 percent.

According to Mr. Lecluse's uncontradicted evidence, the comparable sales levels for business managers at other dealerships which he owned were about 50 percent for sales financing and extended warranties and 75 percent for rustproofing. Mr. Chamberlin testified that the decrease in his financing sales had been due to a lowering in the finance charges on loans being offered by financial institutions. Mr. Lecluse's testimony on point, while somewhat disjointed, suggests that no similar drop in financing arrangements was experienced by business managers in his other dealerships. Mr. Chamberlin gave no explanation for the drop in sales of extended warranties.

The figures referred to above relate to vehicles actually delivered to customers. Accordingly, certain sales made in one month are included in the figures for a later month. This does not, however, alter the fact that Mr. Chamberlin's overall sales were falling rather than moving towards the sales levels being

achieved by business managers at other dealerships. In light of the evidence, I am satisfied that by May, 1985 Mr. Chamberlin's job performance was below a reasonably acceptable level.

In addition to his declining sales performance, during May Mr. Chamberlin began to experience a number of physical symptoms, including chest pains, cold feet and nausea. He was eating more but losing weight at the same time. Mr. Chamberlin testified that there were occasions when he was alone at work when he found himself crying, and that "I would even find myself sitting there thinking where am I, who am I, what am I doing here it was almost like I was lost."

On or about May 30, 1985 Mr. Chamberlin made his first visit to Dr. Joseph Fried, a family physician. After listening to Mr. Chamberlin describe his physical symptoms, Dr. Fried concluded that he was suffering from extreme anxiety resulting from a number of stressors, including his divorce and the fact he felt overworked. Dr. Fried prescribed some anti-anxiety medication for Mr. Chamberlin and provided him with supportive psychotherapy with the aim of trying to get Mr. Chamberlin to become more objective about some of his problems, to help him find a way to relax and to help him gain some coping over his anxiety.

On the following day Mr. Chamberlin returned to see Dr. Fried. Dr. Fried testified that on this occasion Mr. Chamberlin appeared agitated, upset, anxious, tired, totally unhappy and "almost kind of out of control." Mr. Chamberlin again saw Dr. Fried on June 4, 1985. They discussed Mr. Chamberlin's marriage breakup, the problems he was having with his lawyer and the long hours he was putting in at work. Dr. Fried concluded that Mr. Chamberlin's condition was definitely caused by severe anxiety and recommended that he take some time off to see if he could gain some coping mechanisms. Dr. Fried testified that he felt that if Mr. Chamberlin took some time away from all the anxiety-provoking things in his life, it might give him some time to reflect on the ways he could cope with his problem. Mr. Chamberlin told Dr. Fried that the dealership really needed him and might not allow him time off. Dr. Fried's response was that in his current state Mr. Chamberlin was probably of limited usefulness to his employer. In this regard, Dr. Fried testified that "I felt that he was so distraught, and under so much tension, and so anxious, that he was probably useless at work, and was of no use to his boss, or to his company at all." In furtherance of his recommendation that Mr. Chamberlin take some time off, Dr. Fried provided him with a note which read as follows:

4 June 1985

TO WHOM IT MAY CONCERN

RE: Brett Chamberlin

Brett Chamberlin has been recently under my care and it is my opinion that because of recent severe emotional strain it is medically advisable that he take at least two to four weeks off from his regular work. At the end of this period I will re-exam him and determine if he can then return to work.

yours truly,

"Joseph A. Fried" B.Sc., Ph.D., M.D.

As soon as he left Dr. Fried's office on June 4, 1985 Mr. Chamberlin tried to telephone Mr. Allan Pearson, Stirling Honda's general manager. Mr. Pearson was not available to take the call, and accordingly Mr. Chamberlin advised Mr. Pearson's secretary that he would be coming in with a doctor's note to take some time off work. Mr. Chamberlin then went to the dealership where he told Mr. Pearson that he was sick and that he needed some time off. He handed Mr. Pearson the note from Dr. Fried. Mr. Pearson testified that he was upset by the request for time off due to the fact the letter from Dr. Fried indicated that Mr. Chamberlin was to be off anywhere from two to four weeks, possibly longer, and because the dealership was already operating with one less salesman than he would have liked. Mr. Pearson advised Mr. Chamberlin that he could not accept the letter from Dr. Fried and that if Mr. Chamberlin was going to take some time off, the

dealership would have to replace him. Mr. Chamberlin replied that the dealership could not do that, to which Mr. Pearson replied that the dealership had been advised by the Labour Relations Board that it was not obligated to keep the business manager position open. With respect to this point, Mr. Pearson testified that his secretary had been the one who had actually received this information from the Labour Relations Board.

Mr. Pearson's secretary did not testify in these proceedings. Accordingly she could not be questioned as to who she actually talked to or the details of the discussion. I would, however, note that under the provisions of the Labour Relations Act the jurisdiction of the Ontario Labour Relations Board primarily relates to the relationship between employers and trade unions and, to a lesser extent, the relationship between trade unions and employees. The Board's jurisdiction does not extend to the interpretation or direct enforcement of either the Employment Standards Act or the Human Rights Code. Accordingly, it seems unlikely that the secretary actually received her information from the Ontario Labour Relations Board. One can only speculate as to where it was she received her information from.

Notwithstanding Mr. Pearson's indication that the business manager position might not be kept open if Mr. Chamberlin took time off, Mr. Chamberlin stated that he would be taking some time

off and then left the dealership. On June 6, 1985 Mr. Chamberlin visited a travel agent and made arrangements to spend one week at a "Club Med" resort in the Dominican Republic commencing on or about June 8th. On June 7th, before he left for the Dominican Republic, Mr. Chamberlin telephoned Mr. Pearson to advise him that he was feeling better and would probably be in to work on Monday June 17, 1985.

When Mr. Chamberlin returned to work on June 17th he found that someone else was occupying the business manager's office. An advertisement soliciting applications for the business manager position had been placed in the June 8, 1985 edition of the Hamilton Spectator. In a discussion with Mr. Pearson on June 17th Mr. Chamberlin was advised that he had been replaced as business manager, but that he was being offered a position as an automobile salesman. Mr. Pearson reviewed the automobile sales position with Mr. Chamberlin, noting that it had the potential for the same or greater income but with shorter working hours and less stress. Mr. Chamberlin replied that he did not want to work as a car salesman, but that he would accept the position of fleet and lease manager jointly at Stirling Honda and a Nissan dealership also owned by Mr. Lecluse. Mr. Pearson indicated that if Mr. Chamberlin did not take the sales position the dealership would consider him as having resigned. He then suggested that Mr. Chamberlin take some time to consider the matter. Approximately

two days later Mr. Chamberlin telephoned Mr. Pearson and again advised him that he would accept either the position of business manager or fleet and lease manager, but would not accept a position as an automobile salesman. Mr. Pearson indicated that in the circumstances the dealership considered Mr. Chamberlin as having resigned.

The right to resign is peculiar to an employee. An employer cannot legally deem an employee to have resigned. It follows that Mr. Chamberlin did not resign. Rather his employment was terminated by Stirling Honda.

Mr. Lecluse testified that due to Mr. Chamberlin's declining sales performance, the decision to move him out of the business manager's position had been made prior to him advising Mr. Pearson that he needed some time off. Mr. Pearson's evidence, however, did not go that far. According to Mr. Pearson, the possibility of moving Mr. Chamberlin out of the business manager position was discussed between himself and Mr. Lecluse early in June, but he could not recall if the final decision had been reached prior to or after June 4th. Given the nature of the discussion between Mr. Chamberlin and Mr. Pearson on June 4th, with Mr. Pearson in effect urging Mr. Chamberlin to stay at his job, as well the timing of the advertisement in the Hamilton Spectator, I am led to conclude that as of June 4th no final decision had been reached to move Mr.

Chamberlin out of the business manager position. While management had been considering such a move, it was Mr. Chamberlin's request for time off which prompted the final decision.

Had Mr. Chamberlin taken the automobile sales position, he would have been the sixth salesman at the dealership. Although the evidence is not totally clear on this point, it appears that the dealership had never had as many as six car salesmen before. The evidence does, however, indicate that management had concluded that a sixth sales person was required and indeed in mid-July 1985 it did hire a sixth salesman. Automobile salesmen are paid by commission. At the relevant time their annual incomes ranged from about \$30,000.00 to \$49,000.00, with the average being about \$36,100.00. This figure does not include 4 percent vacation pay or an amount attributable to the use of a car provided by the dealership. In his evidence Mr. Lecluse attributed \$539.00 of the income earned at Stirling Honda by Mr. Chamberlin to the use of a car provided to him by the dealership. Assuming the same \$539.00 figure also applied to an automobile salesman, on an annual basis it would add \$1,868.00 to a salesman's salary. The 4 percent vacation pay would add another \$1,444.00, making the average total income for a salesperson of about \$39,400.00.

In the fifteen weeks that Mr. Chamberlin worked as the business manager at Stirling Honda he earned \$11,542.00 inclusive

of 4 percent vacation pay and the benefit attached to the use of a car. On an annualized basis this would have worked out to some \$40,000.00 per year. Mr. Lacluse, however, took the position that because Mr. Chamberlin had worked in the spring, which is a particularly good time for automobile sales, his annual income in his first year would likely have been about \$30,000.00.

Mr. Chamberlin testified that he believed it would have taken him two to three years before he had the potential to make the same money in automobile sales as he expected to earn as business manager. This estimate was challenged by Mr. Lacluse who felt that with his background in car sales, Mr. Chamberlin would have likely made between \$35,000.00 and \$50,000.00. In support of this position, Mr. Lecluse contended that although Mr. Chamberlin did not have a customer base for car sales at Stirling Honda, such a base did not mean a lot since the purchasers of automobiles do not generally demonstrate loyalty to a particular salesman.

Had Mr. Chamberlin continued in the business manager position and his performance not been affected by stress factors, I believe it reasonable to assume that he would have made approximately \$40,000.00 in his first full year of employment. In reaching this conclusion I have not disregarded the fact that automotive sales are generally not as high at other times of the year as they are in the spring. Offsetting this, however, would have been Mr.

Chamberlin's increased experience in the business manager position as well as a likely increase in cooperation from other sales staff. Given Mr. Chamberlin's sales experience, and his abilities as a salesman, I believe it also reasonable to assume that as an automobile salesman Mr. Chamberlin would have made about \$39,000.00 in his first year.

When explaining why he had not accepted the automobile sales position, Mr. Chamberlin relied, in part, on the fact that sales staff were not paid until a vehicle had actually been delivered to a customer. The same situation, however, also applied with respect to services sold by the business manager.

Mr. Chamberlin returned to see Dr. Fried on June 25, 1985, approximately one week after his return from the Dominican Republic. Dr. Fried testified that on this occasion Mr. Chamberlin looked relaxed, well rested and seemed far more rational. Dr. Fried provided Mr. Chamberlin with a note which read as follows:

To whom it may concern,

Brett Chamberlin has been under my care since May 30, 1985. He was at that time in a state of severe anxiety alternating with bouts of depression. This state of mind was precipitated by a very trying and difficult domestic situation that appeared to be unresolvable. In my opinion, he was in such an emotional state that I was afraid he might be capable of irrational actions. The best remedy at the time appeared to be a complete change of environment, that is a short holiday. This treatment

has worked well. He is much better. He is ready to report for any work immediately.

When Mr. Chamberlin visited Dr. Fried on June 25th he had already ceased to be employed at Stirling Honda. Mr. Chamberlin testified that he asked Dr. Fried for the note so that anyone considering hiring him would not be concerned about a relapse.

Mr. Chamberlin again visited Dr. Fried in January and February of 1986. According to Dr. Fried, in January Mr. Chamberlin was again very anxious, despondent, and unhappy, although not as low as he had seen him in June of the previous year. Dr. Fried attributed part of Mr. Chamberlin's dispondency to his inability to find suitable employment.

As indicated above, in June of 1985 Dr. Fried was of the view that Mr. Chamberlin was suffering from acute anxiety. In a report prepared on November 26, 1988 at the request of Commission counsel, Dr. Fried reviewed his contacts with Mr. Chamberlin and then commented as follows:

CONCLUSION

Brett Chamberlin suffered numerous episodes of acute anxiety attacks superimposed on a background of chronic anxiety. The acute episodes were triggered by the failure of his marriage which happened to coincide with a difficult and stressful job. As a consequence he lost his marriage and his job. Some of his problems also result from personality factors as well. His high level of stress, especially during those periods of superimposed acute attacks have contributed materially

to his many somatic symptoms.

Dr. Fried's analysis of Mr. Chamberlin's condition was not completely shared by Dr. Harvey Stancer, a psychiatrist retained by the Commission expressly for the purpose of these proceedings. Dr. Stancer reviewed Dr. Fried's notes, talked briefly with Dr. Fried and interviewed Mr. Chamberlin on November 12, 1988 for about an hour and a half. Dr. Stancer concluded that in June of 1985 Mr. Chamberlin had been suffering from an adjustment disorder with depressed mood. He testified that while it is quite normal for people to have anxiety in an anxiety provoking situation and to also feel a depressive symptom, generally these conditions do not interfere with an individual's ability to function. When stressors interfere with an individual's mode of function, however, there is a maladaptation. On the basis that Mr. Chamberlin felt that he had not been able to carry out his work functions as adequately as before, and because his other symptoms were in excess of a normal and expectable reaction to stressors, Dr Stancer concluded that he was experiencing a maladaptive reaction to stressors.

When giving his evidence Dr. Stancer referred to a text published by the American Psychiatric Association entitled "Diagnostic and Statistical Manual of Mental Disorders DSM-III-R." Portions of this text were filed at the hearing by

Commission counsel. The text contains the following general discussion of an adjustment disorder:

ADJUSTMENT DISORDER

The essential feature of this disorder is a maladaptive reaction to an identifiable psychosocial stressor, or stressors, that occurs within three months after onset of the stressor, and has persisted for no longer than six months. The maladaptive nature of the reaction is indicated either by impairment in occupational (including school) functioning or in usual social activities or relationships with others or by symptoms that are in excess of a normal and expectable reaction to the stressor. The disturbance is not merely one instance of a pattern of overreaction to stress or an exacerbation of one of the mental disorders previously described in this manual. It is assumed that the disturbance will remit soon after the stressor ceases or, if the stressor persists, when a new level of adaptation is achieved. The severity of the stressor and the specific stressor should be noted on Axis IV (see p. 18).

The stressors may be single, such as divorce, or multiple, such as marked business difficulties and marital problems. They may be recurrent, e.g., associated with seasonal business crises, or continuous, e.g., caused by residence in a deteriorating neighbourhood or the psychosocial stress associated with a chronic illness. They can occur in a family setting, e.g., in discordant intrafamilial relationships. They may affect only a particular person, e.g., in a psychosocial reaction to a physical illness, or they may affect a group or community, e.g., as in a natural disaster, or persecution based on racial, social, religious or other group affiliation. Some stressors may accompany specific developmental events, such as going to school, leaving the parental home, getting married, becoming a parent, failing to attain occupational goals, and retirement.

The severity of the reaction is not completely predictable from the intensity of the stressor. People who are particularly vulnerable may have a more severe form of the disorder following a mild or moderate stressor, whereas others may have only a mild form of

the disorder in response to a marked and continuing stressor.

This category should not be used if the disturbance meets the criteria for a specific mental disorder, such as a specific Anxiety or Mood Disorder, or represents Uncomplicated Bereavement.

The same text indicates that there are a variety of types of adjustment disorders. In addition to those accompanied by a depressed mood, there are adjustment disorders with anxious mood (the predominant manifestation being symptoms such as nervousness, worry and jitteriness), with disturbance of conduct (manifested by conduct such as truancy, vandalism, reckless driving), with physical complaints (fatigue, headache, backache), with withdrawal (social withdrawal) and with work inhibition. The text also lists adjustment disorders "with mixed emotional features" and "with mixed disturbance of emotions and conduct." In addition, the text refers to an "adjustment disorder not otherwise specified".

At the request of the Commission, Dr. Stancer prepared a report relating to Mr. Chamberlin. The conclusion of the report read as follows:

In summary, there seems to be good evidence in the brief notes of Dr. Fried, to support the notion that Mr. Chamberlin was indeed having difficulty functioning, both at home and at work at the end of May and beginning of June of 1985. The symptoms of spontaneous crying, depressed feelings, change in food habits and change in weight, along with insomnia would suggest a diagnosis of Adjustment Disorder with Depressed Mood. This disorder, which is characterized by depressed mood, tearfulness,

and feelings of hopelessness is described in the recent Diagnostic and Statistical Manual III R of the American Psychiatric Association. These symptoms usually arise as a result of some problems in the person's life, related to marriage or work, for example. Dr. Fried used the term Anxiety State which referred to one aspect of this diagnosis. Treatment can consist of psychotherapy with or without medication. The most conservative treatment would be psychosocial treatment such as getting the individual out of their environment, as was apparently recommended by Dr. Fried when he recommended a vacation. Fortunately, this suggestion of time off work was helpful. The most important evidence in support of this recommendation, at that time, is the suggestion that Mr. Chamberlin felt he was losing control. Further evidence of Mr. Chamberlin's vulnerability, is apparent in the subsequent notes in Dr. Fried's chart when Mr. Chamberlin had difficulty coping when he was out of work. In conclusion, Mr. Chamberlin does have evidence of having had a psychological condition related to stressful events in his life in May-June of 1985, which interfered with his inability (sic) to function adequately and required medical intervention. I would support the medical recommendation that he have a brief period of time away from work.

Counsel for the respondents questioned Dr. Stancer as to whether an appropriate response on the part of the employer might have been to offer Mr. Chamberlin another position within the organization, one that might be less stressful. Dr. Stancer replied as follows:

Well, we are into theoretical issues. I would have thought it would have been very helpful if the employer had said look, you are having a tough time, why don't we give you a period of time, without the threat, without even a possible threat that you are going to lose something, but perhaps I will let you work at something else for the next month, or so, which is a lot easier. That is possible. I would have thought - I am going to try, to make your stress less, at least at work. But I am not aware that that was suggested.

The relevant provisions of the Human Rights Code in force in June of 1985 are set out below:

PART I

4. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, record of offences, marital status, family status or handicap.

8. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

PART II

9. In Part I and in this Part,

...

(b) "because of handicap" means for the reason that the person has or has had, or is believed to have or have had,

(i) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impairment, deafness or hearing impairment, muteness or speech impairment, or physical reliance on a dog guide or on a wheelchair or other remedial appliance or device,

(ii) a condition of mental retardation or impairment,

(iii) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language, or

(iv) a mental disorder;

(c) "equal" means subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination;

16. (1) A right of a person under this Act is not infringed for the reason only,

...

(b) that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

A useful guide to the law in this area is to be found in the decision of Professor Peter Cumming in Cindy Cameron v. Nel-Gor Castle Nursing Home, (1984) 5 C.H.R.R. D/2170. This was the first case in which a board of inquiry dealt with "handicap" as a prohibited ground of discrimination under Ontario human rights legislation. In his decision Professor Cumming reviewed the history of human rights legislation in Canada as well as the development of "handicap" as a prohibited ground of discrimination. He concluded that the objectives of the Code's handicap provisions in so far as they relate to employment are as follows:

First, there is an objective of securing for the handicapped person equality of opportunity with respect to employment. Everyone deserves the same opportunity and chance to make the most of life, regardless of physical or mental handicap.

A corollary is to require an employer to make a decision respecting employment of a handicapped person based upon a fair and accurate assessment of her true ability, and not based upon a stereotype or misconception about her handicap. Having a handicap means not being able to do one or more important things that most people can do. The law cannot make a person's handicap disappear, of

course, but it does insist that every person receive a fair chance to show what she is able to do, taking into account her ability. The law now protects every person from being pre-judged because of handicap by an employer. Equal opportunity for someone with a handicap means equal opportunity to do the things she can do effectively and safely. The law does not impose any undue hardship upon the employer, or require that a person who presents a danger to the safety of the employee or others, or the employer's property, be employed.

As indicated in the above quoted excerpt, the Code does not ignore the fact that certain handicaps can negatively impact on an individual's ability to perform certain types of work. If a person is unable to adequately perform a particular job because of a handicap, the Code does not entitle that person to employment in the job. What the Code does do is ensure that persons with a handicap are not discriminated against with respect to jobs they are capable of performing. All too frequently handicapped persons are discriminated against, either out of irrational prejudice or ignorance, with respect to jobs they can perform. Circumstances may exist where a handicapped person will be capable of performing the essential functions of a position provided some reasonable steps are taken to accommodate the handicap. The Code now expressly imposes such a reasonable accommodation requirement on employers, although it did not do so at the time of the events giving rise to these proceedings. Nevertheless, even prior to the amendment to the Code the case law held that the requirement of reasonable accommodation was inherent in the wording of Section 16

(1) (b). In this regard see the May 30, 1988 unreported decision of Professor Cumming in John Belliveau v. Steel Company of Canada.

I turn now to the facts of the instant case. The first issue to be addressed is whether at the relevant time Mr. Chamberlin had "a mental disorder" and thus a handicap within the meaning of the Code. As already noted, Dr. Stancer diagnosed him as having an adjustment disorder with depressed mood. From a lay person's perspective, Mr. Chamberlin had difficulty adjusting to the pressures he was under with the result that he exhibited a depressed mood and his work performance became impaired. This is not as severe a disorder as a number of other, better known, mental disorders. The Code does not, however, contain a listing of only certain mental disorders which are to be considered a handicap or provide that only mental disorders of a severe nature are to be so regarded. In these circumstances, and in light of the testimony of Dr. Stancer, I conclude that Mr. Chamberlin's condition, namely an adjustment disorder with depressed mood, is a mental disorder and thus a handicap under the Code.

As noted above, the respondents take the position that they could not have discriminated against Mr. Chamberlin because they were unaware that he had a handicap. There is nothing to indicate that Mr. Pearson put his mind to the question of whether Mr. Chamberlin had a mental disorder constituting a handicap under the

Code. Further, as a lay person he could not have known the precise nature of Mr. Chamberlin's disorder. Even Dr. Fried was not fully aware of that. Nevertheless, Mr. Pearson had sufficient information to know that Mr. Chamberlin had a medical problem. Dr. Fried's note of June 4, 1985 advised him that Mr. Chamberlin was under severe emotional strain and under a doctor's care. Further, Mr. Pearson's own comments to Mr. Chamberlin on June 17, 1985 indicate that he recognized that Mr. Chamberlin's difficulties were, in part, due to his inability to handle the stress he was under. In general terms Mr. Pearson, and through him Stirling Honda, was aware that Mr. Chamberlin was labouring under a disability. For the purposes of assessing whether or not they breached the Code, I am satisfied that it matters not that the respondents were not aware of the proper medical term to describe Mr. Chamberlin's condition or that they were not aware that his condition met the legal definition of a handicap under the Code.

The next issue to be addressed is whether Stirling Honda and Mr. Pearson infringed Mr. Chamberlin's right to equal treatment with respect to employment because of his handicap. As noted above, the Code does not give a person with a handicap the right to a position he can not effectively perform. Instead it provides him with an equal opportunity with respect to positions he can perform. As stated by Professor Cumming in the Belliveau case, "Equal opportunity for someone with a handicap means equal

opportunity to do the things he can do effectively." The evidence in this case establishes that because he had an adjustment disorder with depressed mood, Mr. Chamberlin's job performance deteriorated. This was consistent with his disorder, since one of its symptoms is an impairment in occupational functioning. As a result of his disorder, I am satisfied that as of June 4, 1985 Mr. Chamberlin was, in fact, incapable of effectively performing the essential duties of his position

As noted above, the case law indicates that even under the wording of the Code that was in force at the relevant time, an onus lay on an employer to reasonably accommodate an individual with a handicap. With respect to an employee with an adjustment disorder, such an accommodation would logically involve allowing him a certain period of time away from work. Although Mr. Pearson objected to Mr. Chamberlin taking any time off, Mr. Chamberlin nevertheless took time off without being discharged for doing so. The issue then arises as to the propriety of the respondents' action in permanently replacing Mr. Chamberlin in the business manager position and on his return on June 17th insisting that he work as an automobile salesman.

If as of June 17, 1985 Mr. Chamberlin was able to effectively perform the essential duties of the business manager position; the respondents were obliged to let him return to his regular duties

and their refusal to allow him to do so would have constituted unlawful discrimination on the basis of handicap. In light of Section 16 (1) (b) of the Code, however, if it had been properly determined that Mr. Chamberlin was incapable of fulfilling the essential duties of the position, he would have had no entitlement to reoccupy the business manager position. Likewise, if Mr. Chamberlin had been placed back into the business manager position but then demonstrated that he could not effectively perform the related job duties, he would not have had a legal entitlement to remain in the position. In either of these latter situations, I am satisfied that the offer of a position as an automobile salesman would have constituted a reasonable accommodation to Mr. Chamberlin's handicap. This conclusion is based, in part, on the fact that although called a business manager, Mr. Chamberlin was not a managerial person but a commission salesman. For him to become an automobile salesman would have involved a move from one commission sales job to another commission sales job with a similar salary.

The difficulty in this case arises from the fact the respondents made no attempt to determine whether as a result of having taken some time off work Mr. Chamberlin was now capable of effectively performing the essential requirements of the business manager position. In this regard, it will be recalled that at some point between June 4th and the running of a job advertisement

in the Hamilton Spectator on June 8th, the management of Stirling Honda determined that Mr. Chamberlin should be permanently replaced. This decision was not reconsidered when Mr. Chamberlin returned to the dealership on June 17th.

In the Belliveau case it was held that the employer was required to objectively assess whether an individual with an injured shoulder was capable of returning to work and performing the essential functions of his job before it reached the conclusion that he could not do so. I adopt that reasoning with respect to the instant case. Given the structure and purpose of the Code, I find that in order to rely on the provisions of Section 16 (1) (b) Stirling Honda was required to fairly and accurately assess Mr. Chamberlin's ability to perform the business manager position at the time he returned to work on June 17, 1985. In order to enable the dealership to properly do so, it would have been open for the respondents to require that Mr. Chamberlin provide a medical certificate indicating that he was capable of returning to work in his former position. If the respondents had reasonable grounds to doubt the correctness of such a certificate, or the adequacy of the information provided by Mr. Chamberlin to the doctor who prepared the certificate, they could have required that Mr. Chamberlin secure additional medical certification or, in the circumstances, even require that he undergo a medical examination by a specialist in mental disorders. In that the

respondents failed to make any assessment of Mr. Chamberlin's capability to perform the essential requirements of the business manager position before refusing to allow him to return to the position, I am satisfied, and so find, that the respondents were in violation of both sections 4 (1) and 8 of the Code.

This conclusion leads to the issue of an appropriate remedy. The Commission contends that Mr. Chamberlin should be compensated for having been discriminated against as well as for his financial losses up to the point that he was able to find an equivalent job. In this regard it argues for total compensation in excess of \$31,000.00. A difficulty with this claim relates to the possibility that had the respondents made a reasonable assessment of Mr. Chamberlin's ability to perform the job of business manager as of June 17, 1985, they would have appropriately concluded that he could not adequately perform the duties of the position. Further, had Mr. Chamberlin in fact been returned to the business manager position, the stress attached to the position, together with the other stresses on him, might have combined to make him unable to properly perform the job.

The clearest medical evidence with respect to Mr. Chamberlin's ability to return to the business manager position as of June 17, 1985 appears to be the note written by Dr. Fried, his personal physician, on June 25, 1985, approximately one week

later. The note stated that Mr. Chamberlin was much better and ready to report for work. It is clear from Dr. Stancer's evidence, however, that Dr. Fried was not fully aware of the nature of Mr. Chamberlin's condition. Further, it will be recalled that when testifying in these proceedings Dr. Stancer indicated it would have been helpful if the employer had assigned Mr. Chamberlin to an easier job for a month or two.

I am of the view that it is appropriate to assess the medical evidence in light of the stressors Mr. Chamberlin was likely to face if he returned to the business manager position. I note that a somewhat similar conclusion was reached by the arbitrator in Re Catelli Inc. and Syndicat International des Travailleurs et Travailleuses de la Boulangerie, Confiserie et du Tabac, Local 227 (1988) 2 L.A.C. (4th) 97 (Frumkin). The grievor in that case had been discharged due to excessive absenteeism. The absenteeism had been caused, in part, by the grievor's inability to cope with stress. In assessing the medical evidence before him the arbitrator declined to share the optimism of certain doctors who gave evidence on behalf of the grievor as to the likelihood of her being able to attend work on a regular basis, reasoning as follows:

But in the final analysis the fact remains, and none of the physicians who testified on behalf of the grievor disputed very forcefully that the grievor does not react well to stress-causing personal problems and continues even as late as October, 1988, to experience high levels

of anxiety necessitating treatment. The tribunal was left with the very distinct impression after hearing the medical evidence presented on the grievor's behalf that the hope and optimism expressed by her physicians presupposed an absence of any personal problems or anxiety provoking developments in her life. Unfortunately for the grievor the tribunal cannot conduct its assessment upon the same suppositions.

Presumably after Mr. Chamberlin returned from his week at Club Med, he again had to face the stresses associated with his marriage breakup, his wife's demands, and his problems with his lawyer. Most importantly for the purpose of these proceedings, had he returned to the business manager's position he would again have been under the stress related to that position with its long hours of work.

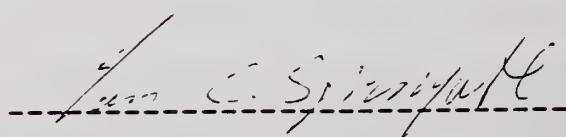
Taking into account the essence of Mr. Chamberlin's handicap, namely an inability to appropriately adapt to stress, the fact he was already subject to a number of non-work related stressors and that if placed back in the business manager position he would again be faced with the stress associated with that position, I believe it likely that a reasonable assessment of Mr. Chamberlin's condition as of June 17, 1985 would have resulted in a conclusion that he was not able to adequately perform the duties of that position. As already noted, in such a situation the offer of an automobile sales job would have constituted a reasonable accommodation to Mr. Chamberlin's handicap. Mr. Chamberlin was offered such a position but declined it. Notwithstanding my views

expressed above, however, I cannot say with total assurance that as of June 17, 1985 Mr. Chamberlin would have been assessed as unable to handle the business manager position. Given that it was the failure of the respondents to properly assess Mr. Chamberlin's ability at the relevant time which results in this uncertainty, I hold that Mr. Chamberlin is entitled to be compensated for the possibility that he might have been able to return to the business manager position as of June 17, 1985. While the value of such a possibility cannot be determined with any degree of certainty, I believe a reasonable estimate to be \$2,500.00.

ORDER

This Board of Inquiry, having found the respondents, 599273 Ontario Limited carrying on business as Stirling Honda and Allan Pearson, to have breached Section 4(1) and Section 8 of the Human Rights Code in respect of Mr. Brett Chamberlin, for the reasons given, orders that the respondents, jointly and severally, forthwith pay to Mr. Chamberlin the sum of \$2,500.00.

Dated at Toronto, this 16th day of June, 1989.



Ian C. Springate

Board of Inquiry